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No. 119

In the Supreme Court of the United States

OCTOBER TERM 1968

THOMAS KAPATOS,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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INDEX

	PAGE
Judgment and Opinion of the Court Below	1
Jurisdictional Statement	2
Questions Presented for Review	2
Statutes Involved	3
Statement of the Case	4
Reasons Relied on for Granting the Writ	8
Conclusion	19

CASES CITED

Ashley v. Texas, 319 F.2d 80, 5 Cir. (1963)	17
Barbee v. Warden, 331 F.2d 842, 4 Cir. (1964)	17
Berger v. United States, 295 U.S. 78, 88	19
Brady v. Maryland, 373 U.S. 83 (1963)	15
Giles v. Maryland, 386 U.S. 66 (1967)	15, 17, 18
Hamric v. Bailey, 386 F.2d 390, 4 Cir. (1967)	14
Hamric v. Bailey, 274 F.Supp. 240 (1967)	15
Jackson v. Wainwright, 390 F.2d 288, 5 Cir. (1968)	13
Kapatos v. United States, 386 U.S. 836 (1967)	2
Kapatos v. United States, 255 F.Supp. 332 (1967)	2
Levin v. Katzenbach, 363 F.2d 287 (1966)	16, 17
Miller v. Pate, 386 U.S. 1 (1967)	15

PAGE

State v. Hamric, 151 W.Va. ....., 151 S.E.2d 252 .....14, 15

United States v. Dye, 221 F.2d 763, 5 Cir. (19....) 17

United States v. Pool, 379 F.2d 645, 7 Cir. (1967) 16

STATUTES CITED

Title 18, U.S. Code, Section 659 3

Title 28, U.S. Code, Section 2255 .....3, App. 4

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Petitioner, Thomas Kapatos, respectfully prays that a writ of certiorari be issued to review the decision of the United States Court of Appeals for the Second Circuit.

JUDGMENT AND OPINION OF THE COURT BELOW

On April 20, 1968, the Court of Appeals for the Second Circuit affirmed, without opinion, the judgment of the United States District Court for the Southern District of New York dismissing petitioner's prayer for relief under

Section 2255, Title 28 U.S. Code. The opinion of the District Court, rendered November 30, 1967, is reported in 255 F.Supp. 332, and is printed herewith as Appendix "A".

JURISDICTIONAL STATEMENT

After conviction in October, 1966 on a charge of theft from interstate shipment in violation of Section 659, Title 18 U.S. Code, petitioner filed his direct appeal to the United States Court of Appeals for the Second Circuit which court affirmed, without opinion, on March 15, 1967 (case No. 32028). Petition for a writ of certiorari was denied by this court on October 9, 1967, *Kapatos* v. *United States*, 386 U.S. 836.

Thereafter, petitioner filed his prayer for relief in the trial court under Section 2255, Title 28 U.S. Code, which petition was denied by the trial court on November 30, 1967. On review to the Court of Appeals for the Second Circuit from the judgment dismissing the petition under Section 2255, the judgment of the trial court was affirmed, without opinion, on April 23, 1968.

The jurisdiction of this court is invoked under Title 18 U.S. Code, Section 1254(1).

QUESTIONS PRESENTED FOR REVIEW

1. Whether a conviction can withstand attack pursuant to Section 2255, Title 28, U.S. Code demonstrating affirmatively that the prosecution suppressed evidence favorable to the defense.

2. Whether this court, in the exercise of its supervisory powers over federal prosecutions, will sanction a procedure whereby the prosecution failed to disclose to the defense, prior to trial, the existence of exculpatory evidence in its possession.

3. Whether a conviction may stand where the theory of the prosecution as enunciated at trial was known by the prosecution to be unsupported by any evidence, and where the prosecution had in its possession evidence which would contradict that theory and which evidence the prosecution did not disclose either prior to or during trial.

4. Where petitioner made specific pretrial demand for the existence of any exculpatory material and where the prosecution in supplying a list of witnesses "inadvertently" omitted the name of the one witness who made statements to the F.B.I. favorable to the petitioner and in contradiction of the government's theory of the case, which statements the prosecution had in its files, was not a sufficient showing made for the grant of 2255 relief?

5. Whether the affirmance by the Second Circuit Court of Appeals, is in conflict with the decisions of this court (*Giles* v. *Maryland,* 386 U.S. 66 (1967), *Brady* v. *Maryland,* 373 U.S. 83 (1963) and *Miller* v. *Pate,* 386 U.S. 1 (1967)) and in direct conflict with the decision of the Fourth Circuit in *Hamric* v. *Bailey,* 386 F.2d 390 (1967) and the Fifth Circuit in *Jackson* v. *Wainright,* ..... F.2d ..... (2/26/68).

STATUTES INVOLVED

Title 18, U.S. Code, Section 659, in pertinent part, and Title 28, U.S. Code, Section 2255, in pertinent part, are set out in Appendix "B".

STATEMENT OF THE CASE.

The proceedings below were maintained upon the affidavits and counter-affidavits of the parties. Petitioner moved under appropriate statutes to set aside his conviction (affirmed on March 15, 1967), for hi-jacking, as proscribed by Title 18, United States, Section 659.

His petition for relief alleged that the government had, during the trial, urged upon the jury the proposition that a certain state of affairs was factually true, knowing that such state of affairs was not factually true, and, indeed, then and there being possessed of evidence (which was not disclosed to the defense) which contradicted the assertions.

The facts which give rise to his contentions are these:

In the original trial, the government adduced evidence that on March 8, 1963, six jewelry messengers employed by AAA Jewelers Service were waylaid by a black sedan, occupied by two men dressed as policemen while the messengers were traveling in their master's automobile containing a quantity of jewelry (R. 709, 716).[1] The undisputed evidence revealed that the uniformed man on the passenger side of the bandit vehicle alighted, drew a pistol, and approached the victim's auto, threatening the messengers, requiring them to get out and herding them into a waiting panel truck where they were bound and driven off by three accomplices (R. 709, 716). As the first bandit busied himself with the six messengers, the black sedan was moved forward (R. 709) or as one witness said, "pulled away" (R. 108).

Upon departure of the panel truck, bystanders at the scene observed a uniformed man enter the now unoccupied station wagon and attempt to remove it. His un-

---

[1] "R" refers to transcript of record as filed with the Court of Appeals and in this Court.

familiarity with the manual shift frustrated his efforts, and after unsuccessfully eliciting aid from one of the bystanders, the uniformed man departed (R. 710, 726).

The bystander witnesses identified the man who sought to remove the victim vehicle as a tall, red-headed man, but stated with certainty that that man was not petitioner (R. 710, 726). Some of the messengers, on the other hand, stated that the uniformed man who had approached their automobile with a drawn pistol was petitioner (R. 734). At the trial of the case, petitioner sought to discredit each of the messenger witnesses, and showed that the one messenger who identified him positively and the three messengers who were in varying degrees less sure of his identification, identified him only after they were taken by agents of the FBI to a place where he was working, where he was identified (R. 38-9, 119-20, 154-5, 734). Two of the messengers stated they could not identify him under any circumstances (R. 204, 224-5).

The messenger witnesses were otherwise sought to be discredited in the course of the trial, based upon their previously erroneous description to the police and FBI agents of the person of petitioner (R. 55-9, 66-8, 123-126, 156-60, 168, 184-6).

In the trial of the case, the prosecutor "reconciled" the varying identifications between the two groups, *viz:* the bystanders on the one hand and the victims on the other, on the supposition that the members of each of the two groups were in fact identifying different individuals. The prosecutor contrived support for this hypothesis, for which there was no evidence (R. 710-711) by exhorting the jury that after the first bandit who emerged from the bandit car had completed the herding of the victims into the panel truck, he exchanged places with the original driver of the bandit car (R. 711). (Which then followed the panel truck to a rendezvous whence he and his henchmen

fied (R. 709-710)). In making the exchange, the prosecutor theorized, the original driver of the bandit sedan remained at the holdup scene in order to make off with the victim vehicle and its cargo of jewels (R. 711).

In the proceedings below, petitioner complained that the prosecution had enunciated that theory, knowing it to be false, the prosecution being possessed of evidence at the very time of proposing its theory that no switch between uniformed bandits had taken place (R. 711-713). It would follow, petitioner claimed, that but one bandit both threatened the messengers and attempted to drive away the victim vehicle, hence the prosecution had used against him both the equivalent of false testimony, and, by failing to disclose evidence in its possession that no exchange of bandits had occurred, had effectively suppressed exculpatory evidence (R. 712-713).

Petitioner's motion for relief was supported by the affidavit of one John Joyce, who claimed to have been in the immediate vicinity during the holdup, and observed that the very police officer who threatened the messengers attempted to drive off in the victim vehicle (R. 718-719).

Counsel for petitioner stated that he had not known of the existence of John Joyce until after the trial, when he learned of his existence, and of the fact that his testimony was both exculpatory in the light of the prosecution theory, and that the government knew of the evidence that he could give prior to trial (R. 712-713).

Petitioner also complained that in providing defense counsel a list of witnesses by pre-trial letter, the prosecution omitted the name of John Joyce (R. 715). This was claimed by petitioner below, to constitute suppression of the identity of John Joyce.

The government filed a counter-affidavit, averring that its failure to supply the name of John Joyce in the letter in question was an inadvertence consequent upon its confusion with investigative materials relating to one James Joyce, whose name was supplied to the defense (R. 729).

The government contended that the slightest diligence in making inquiry of James Joyce would inexorably have led to the person of John Joyce, James Joyce's brother, so that petitioner could not properly claim a suppression, or an effective failure to disclose (R. 730-732, 735-737). The government further averred that months prior to trial, defense counsel had acknowledged his study of a magazine article, which article revealed the brothers Joyce as observers of the holdup (R. 735).

In its affidavit, the government admitted to having individual statements by the brothers Joyce, in which each said he observed the holdup transaction, and that only one bandit ever emerged from the bandit car, that one being the tall, red-headed, uniformed man [said by the bystanders not to be Kapatos] (R. 730-731). In further affidavits and counter-affidavits, the defense claimed that despite the government's contentions that the defense had never sought the names of these witnesses or copies of their statements, the defense had sought that material through a petition for a bill of particulars (R. 754-755), successfully resisted by the government.

REASONS RELIED ON FOR GRANTING THE WRIT

On November 8, 196[illegible], six messengers carrying jewelry in their employer's station wagon were curbed by a black sedan occupied by two ostensive policemen. On alighting, the passenger police-bandit herded the messengers into a waiting panel truck where they were bound. Meanwhile, the black sedan of the police-bandits pulled away (R. 108). Three henchmen of the original bandit, all masked, drove the truck containing messengers away. Upon departure of the panel truck, bystanders observed a man in police uniform attempt unsuccessfully to drive the station wagon. His unfamiliarity with its manual shift frustrated his efforts, so he departed, on foot (R. 710).

Ten persons—the six messengers and four bystanders—had contact with a robber dressed as a policeman. Of these, four, Kreisman, Figueroa, White and Moots, all messengers, identified defendant as the policeman-robber who alighted from the black sedan. Two other messengers could not identify defendant as the policeman-robber, who alighted from the sedan (R. 204, 224-5).

Four bystanders, some who attempted to instruct the policeman-robber in the operation of the manual shift, testified that defendant was not the policeman-robber who attempted to remove the station wagon. (R. 293, 316-8, 319-21, 330).

At trial the government was therefore confronted with eye witness testimony which would almost assuredly result in an acquittal. To avoid such acquittal, the government developed the theory that the policeman-robber who alighted from the sedan, and the policeman-robber who was ob-

served by the bystanders, were not the same man. The prosecutor argued in his opening statement:

> "You will learn that the man who stayed with the station wagon, the man who was dressed as a police officer, was not the man who originally got out and ordered the station wagon to stop, but was the driver of the unmarked car also wearing a policeman's uniform." (R. 711).

The government produced no testimony to such alleged switch. No one testified that in the middle of the robbery the policeman-robber, who was originally the passenger in the black sedan, and who alighted from the black sedan, returned to the black sedan, and now became the driver, where the policeman-robber, who had been the driver of the black sedan, and had remained in the car, alighted from the black sedan. The government based its entire theory upon the discrepancy between the identification of the various eye witnesses.

The government presented such theory to the jury even though it had in its possession the statements of an impartial witness that the policeman-bandit who originally alighted from the car, was the same policeman-bandit who attempted to drive away the station wagon, and was observed by the bystanders (R. 730). Nor was this evidence, which directly contradicted the government's theory, and was therefore very exculpatory in nature, disclosed to defendant, his counsel, or the court.

In the 2255 proceeding, counsel for defendant presented the affidavit of John T. Joyce as follows (R. 718-9):

> AFFIDAVIT
>
> John T. Joyce, being duly sworn, deposes and says:
>
> 1. That I reside at 855 54th Street, Brooklyn, N.Y. and am employed by General Motors for Collier Associates of 49 West 45th Street, New York, N.Y., as a foreman.

2. That on November 8, 1963, I was employed as an iron worker for the Associated Wreckers of 140 West 42nd Street in Manhattan; and I was working on the demolition of buildings on 40th and 41st Streets between 11th and 12th Avenues on November 8, 1963.

3. Approximately 1 p.m., we just got paid on a Friday. We were proceeding to go back to work. We went on top of a pile of debris. Standing there we sprang around and I seen a station wagon loooking like it was going to get a ticket, that a black Ford sedan had pulled it over to the side. The passenger of the black sedan got out and went over to the guys in the station wagon. He was dressed as a cop. He took out a gun. A panel truck at this moment had pulled up alongside of the station wagon, he ordered the men from the station wagon to go into the panel truck. The panel truck pulled away followed by the Ford. The fellow with the gun entered the station wagon, took off his hat and threw it on the seat. *This was the same man with reddish hair that got out of the black sedan originally dressed as a cop.* (Emphasis added). He tried to drive the station wagon and it stalled out on him. He asked a couple of fellows on the job to help him to start it, and he asked Raymond Mullet. At this time my brother and I had come down from the top of the debris and told Ray not to go near the car as it was a stick-up. He fooled with it a while and ran down the block. We told him the car was rolling and he came back to put the emergency brake on and then left the station wagon alone.

4. I was questioned later by the City Police and the F.B.I. and I gave a statement regarding this to an F.B.I. agent. This statement was given about November 12, 1963.

/s/ *John T. Joyce*
(Sworn before a notary
on September 28, 1967)

In the 2255 proceeding counsel also demonstrated that although he had received from the government a list of possible witnesses to the occurrence, John T. Joyce's name was not upon said list. Counsel also demonstrated that prior to trial he had requested "Copies of all statements of witnesses to events leading up to and following the alleged crime, taken by the Federal Bureau of Investigation . . ." (R. 761).

In the 2255 proceeding, the government asserted (1) that the failure to give John T. Joyce's name was due to "inadvertence" as distinguished from purposeful suppression, (2) that defense counsel, with due diligence, could have located John T. Joyce, because his brother's name, who also was a witness, had been delivered to defense counsel, and (3) defense counsel did obtain prior to trial, reports of the New York police department, which contained a statement by John T. Joyce.

In the 2255 proceeding, the government gave no reason for not disclosing the exculpatory statement.

The trial judge denied petitioner a new trial upon the theory (1) that no showing of purposeful suppression was made as distinguished from inadvertence, and (2) defense counsel, being aware of the existence of John T. Joyce, should have located him, and obtained a statement from him, and (3) defense counsel did receive copies of John T. Joyce's statement, given to the New York police. (Appendix "A").

At first blush, the apparent strength of the government's position is that defense counsel did receive, prior to trial, John T. Joyce's statement, given to New York police officers. However, the government's position crumbles upon

reading Joyce's statement submitted to counsel. Exhibit C to government affidavit (R. 744) reads as follows:

> "1. In company with Commanding Officer of the 2nd Detective District and Commanding Officers of the 14th Squad, investigation conducted. John Joyce, employed as an ironworker for the Associated Wreckers of 140 West 42nd Street and working on the demolition of buildings on 41st and 40th Streets, between 11th and 12th Avenue and he stated that on November 8, 1963, while standing with his brother James Joyce, he observed the stickup, a black car pulled up to side of complainant's car, one male dressed in blue uniform with gun in hand, ordered the complainant out of station wagon into black panel truck which pulled alongside of station wagon and that he saw both the car and black truck drive west on 41st Street.
>
> 2. Further, that a man dressed in what appeared to be a police uniform attempted to drive away the station wagon, however, the car stalled and driver could not get it started again. The perpetrator then walked over to Ray Mellet, Foreman, who was sitting in his auto and after a conversation (he asked for help in starting the car) walked toward 12th Avenue.
>
> * * *
>
> Investigating Officer's Name
> James McGerald"

There is lacking in said statement, that crucial information contained in the statements not divulged to defense counsel, to wit, that the policeman-bandit who originally alighted from the truck, and the policeman-bandit who tried to start the station wagon, were one and the same man.

Moreover, this statement, and the fact that defense counsel did receive it prior to trial, demonstrates the fallacy of the government's position that it is excused for failing to divulge Joyce's statement to the F.B.I., because of counsel's apparent lack of diligence in contacting John T. Joyce.

John T. Joyce, although observing the entire robbery, was in no position to be an identification witness. He was situated at such a height that although he could observe clearly the movement of all involved, he could not see the faces of the participants.

Hence, until the government invented at trial the "switch" theory, counsel for defendant had no reason to believe that either of the Joyce brothers would have relevant information. If, in the heat of trial, defense counsel would have reviewed the possible witnesses, he would recall the Joyce statement, and recall nothing in such statement to contradict the government's theory.

In fact, permitting defense counsel to have the "neutral" Joyce statement, without also divulging and giving to defendant the Joyce statement which directly contradicted the government's theory, is similar to the "affirmative misrepresentation" found in *Jackson* v. *Wainwright,* 390 F.2d 288, No. 2433, 5 Cir., (Feb. 26, 1968). In Jackson, the prosecutor told defense counsel that the only other witness to the crime could not identify defendant. He failed to inform defense counsel that said witness was convinced the rapist was light skinned. The defendant was a dark skinned negro. The court held, p. 299, that "The nondisclosure of evidence favorable to the defense, even when there was no showing of prosecution's bad faith, offends the fundamental conceptions of a fair trial essential to due process."

In *Jackson,* the prosecution made a "lack of due diligence argument" similar to that advanced by the government here. The court rejected such assertion as follows:

> "The State urges that it met its duty when it revealed Mrs. Elberty's (witness who had observed occurrence) name and address to the defendant's attorney before trial and by subpoena produced her at the trial. But

> the attorney had not been given a hint as to the exculpatory character of Mrs. Elberty's description of the attacker; the information that she could identify the girl but not the man would tend to make her an undesirable witness for the accused. The prosecution's partially truthful disclosure amounted to an affirmative misrepresentation." (p. 298).

Similarly, by permitting defendant to have Joyce's neutral statement, not contradictory of the government's theory, and by not informing defense counsel of the exculpatory statement, to the F.B.I., the prosecution only lulled defense counsel into the belief that there would be no sense in interviewing John T. Joyce.

Permitting defense counsel to have one statement, and holding back the other is "affirmative misrepresentation," regardless whether there was bad faith on the part of the government.

The facts in the case at bar are as conclusive of prosecutorial suppression of evidence favorable to the petitioner as those in *Hamric* v. *Bailey,* 386 F.2d 390, 4 Cir., (1967).

In *Hamric,* defendant was found guilty of murder. Defendant pleaded self defense in that the deceased was attempting to break into her home through a window. The prosecution claimed deceased was near a hedge 10 feet from defendant's house and defendant shot through the window. After conviction, the defense learned that the prosecution had in its possession evidence from a laboratory examination that slivers of wood and glass were on the deceased's shirt, and that the particles were preserved. The prosecution, knew of the existence of the laboratory report and had possession of the slivers of wood and glass which facts tended to corroborate the defendant's story. The Supreme Court of Appeals of Virginia (*State* v.

Hamric, 151 W. Va. ....., 151 S.E.2d 252) concluded that the information could have been ascertained by the use of due diligence before or during the trial and that the evidence was of doubtful value because it could be used only to credit or impeach prosecution witnesses. The Fourth Circuit in affirming the District Judge's allowance of the Writ of Habeas Corpus (Hamric v. Bailey, 274 F.Supp. 240 (1967)) stated, 386 F.2d 393:

> "If it is incumbent on the State to disclose evidence favorable to an accused, manifestly that disclosure to be effective must be made at a time when the disclosure would be of value to the accused."

Additionally, the Fourth Circuit pointed out that it was suppression of evidence for the State not to have called a witness who could testify that pieces of glass and wood were found on the shirt of the deceased. Citing *Giles* v. *Maryland,* 386 U.S. 66 (1967), *Brady* v. *Maryland,* 373 U.S. 83 (1963), and *Miller* v. *Pate,* 386 U.S. 1 (1967), the court stated, p. 393: "We have concluded that the evidence was material and favorable to petitioner, and our examination of the record satisfies us that it was suppressed."

Prior to the introduction of the government's "switch theory" into the case at bar, there would be no reason to interview the Joyce brothers. A lawyer at trial is expected to prepare for the foreseeable, and should not be expected to be a prophet, Considering that he was able to obtain one of Joyce's statements prior to trial, which did not contain contradictions to the government's theory —and did not get Joyce's exculpatory F.B.I. statement which the government suppressed—his failure to interview John T. Joyce during trial, can not be equated with lack of due diligence.

The decisions of Courts of Appeals other than the Second Circuit, have held, in similar situations, that the fact that counsel might, with more diligence, have been able to obtain the exculpatory evidence, does not diminish the prosecutor's duty to inform defense counsel of such exculpatory evidence. In *Levin* v. *Katzenbach*, 363 F.2d 287, D.C. Cir. (1966), the court held it was improper for the government to fail to inform defense counsel of certain statements of a witness which were exculpatory in nature. The government contended that such information could have been obtained by defense counsel if he had been more diligent in his investigations prior to trial. The court rejected this assertion, stating:

> "Ordinarily, a finding of lack of due diligence will defeat a motion for a new trial based only upon the significance of newly discovered evidence. But appellant's claim for relief based upon a breach of the prosecutor's duty of disclosure challenges the fairness, and therefore the validity, of the proceedings, and relief either on a motion for a new trial or for habeas corpus, may not depend on whether more able, diligent or fortunate counsel might possibly have come upon the evidence on his own. A criminal trial is not a game of wits between opposing counsel, the clever party, or one with the greater resources to be the 'winner'."

In *United States* v. *Pool*, 379 F. 2d 645, 7 Cir. (1967), the court reversed because the government had failed to supply defendant with a report of a doctor which would have impeached the complainant's testimony. The government had asserted that trial defense counsel had not used due diligence. The court responded: "It is true, as the government argues, that defense counsel was not diligent in following up the information obtained at the preliminary hearing, despite its inaccuracy. The government failed to correct the misinformation, however, and

we think under these circumstances Pool should not suffer for the mistakes of his counsel. *Levin* v. *Katzenbach*, 363 F. 2d 287."

Ashley v. *Texas*, 319 F. 2d 80, 5 Cir. (1963), was reversed because the prosecution had failed to inform defense counsel of reports of psychiatrists, which demonstrated that defendant was incompetent, notwithstanding lack of diligence by competent and experienced defense counsel.

In *Giles* v. *Maryland*, 386 U.S. 66, Mr. Justice White, in his concurring opinion, indicated that lack of due diligence did not excuse the prosecutor's failure to inform defense counsel of exculpatory evidence.

In *Barbee* v. *Warden*, 331 F. 2d 842, 4 Cir. (1964), the court considered the effect of non-disclosure of exculpatory evidence, in connection with the possibility that such evidence could have been obtained by diligent counsel. The court stated: "It is no answer that Barbee's attorney failed to ask for the results of the tests. While diligent defense counsel might have learned about the police reports, this is too speculative a consideration to outweigh any unfairness that actually resulted at the trial. He may not have known that tests were made. Indeed he may have been misled into thinking that the tests, if made, supported the state's theory and were adverse to his client . . ."

Similarly, in the instant case, defense counsel, by receiving the New York police report of the statement of Joyce, could have been misled in believing that there was no worthwhile purpose to interview Joyce.

In *United States* v. *Dye*, 221 F.2d 763, 5 Cir. (1955) the court held that the failure to disclose an exculpatory statement of a witness denied defendant a fair trial. The wit-

ness in question was one of the arresting police officers. He had in fact been at trial, although not called. No doubt, defense counsel must have known of his existence, and must have failed to question him prior to t[illegible]. The court reversed, and refused to accept the State's contention that "lack of due diligence" excused the prosecutor's failure to disclose exculpatory evidence.

The "lack of due diligence" argument which has been rejected in the D.C. Circuit, 4th, 5th and 7th Circuits, is based upon the theory that a criminal trial is a game. This "gamesmanship" theory of criminal prosecution, has been rejected by this court in *Giles* v. *Maryland*, 386 U.S. 66. There Justice Fortas, in his concurring opinion, stated,

> "A criminal trial is not a game in which the State's function is to outwit and entrap its quarry. The State's pursuit is justice, not a victim. If it has in its exclusive possession specific, concrete evidence which is not merely cumulative or embellishing and which may exonerate the defendant or be of material importance to the defense . . . the State is obliged to bring it to the attention of the court and the defense."

In the instant case, the government had a weak identification case. Out of 10 possible identification witnesses, four identified defendant, two could not, and four specifically testified defendant was not the policeman-robber. To salvage its case, the government depended upon a theory for which no evidence existed. The government possessed direct evidence from an impartial source which totally contradicted its theory. The government did not inform counsel of such evidence. It had a duty to inform both defense counsel and the court of such exculpatory evidence. Whether its failure to disclose such evidence was purposeful or due to negligence, is immaterial.

The failure to disclose such exculpatory evidence to both defense counsel and the court resulted in a denial of petitioner's right to a fair trial.

The United States is . . . "a sovereignity whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done. . . . [The United States Attorney] is in a peculiar and very definite sense the servant of the law, the twofold aim of which is that guilt shall not escape or innocence suffer. He may prosecute with earnestness and vigor—indeed he should do so. But, while he may strike hard blows, he is not at liberty to strike foul ones." *Berger* v. *United States*, 295 U.S. 78, 88.

The prosecutor's assertion to the jury that the two policeman-robbers had switched places, when no evidence existed to support that theory, in combination with the prosecutor's failure to disclose that affirmative evidence existed to contradict the government's theory, was such a "foul blow."

CONCLUSION

For the foregoing reasons, petitioner prays this court's Writ of Certiorari may be granted.

Respectfully submitted,

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APPENDIX "A"

OPINION OF DISTRICT JUDGE

EDWARD WEINFELD, D. J.

The assertions by defense counsel that John T. Joyce, "a key witness unknown previously to the defendant but within the knowledge of the Government has been found," and that he, defense counsel, "never knew of this witness . . . until after the judgment of conviction," upon which rest the charge that the government suppressed evidence and the claim of newly discovered evidence, are conclusively refuted by the record.

Although John T. Joyce's name was not included in a list, submitted by the prosecution to the defense counsel three months prior to trial, of names and addresses of potential witnesses whom the prosecution did not intend to call at the trial and "who may have information which you [defense counsel] may determine to be pertinent to your client's defense," the omission was without significance. The fact is that defense counsel knew of John T. Joyce long prior to the trial. The omission of his name from the list was clearly inadvertent, an understandable inadvertence, due to confusion arising from the circumstance that John T. Joyce's brother, James P., was also a potential witness, who together with him had observed events that related to the present claims. Both had given statements to the agents of the Federal Bureau of Investigation which were identical as to certain phases of events.

The list submitted to the defense included James, but failed to mention John. This inadvertent omission is now

seized upon by defense counsel to bottom the charge of suppression of evidence or concealment of a material witness. But the fact is that counsel, who here makes the charge, months before the trial himself informed the Assistant United States Attorney of an article about this case which appeared in Life Magazine dated February 7, 1964, more than two and a half years before the trial, and which defense counsel advised the Assistant he had read in preparing for trial. The article contains direct and pointed references to both brothers, John and James, and as to their alleged observation of events at the time of the holdup. Both brothers were convicted of receiving stolen property, the subject matter of the instant indictment.

It is not without significance that James Joyce, named in the list as one "who may have information which you may determine to be pertinent to your client's defense," was not called as a defense witness; indeed, it was acknowledged upon the argument of this motion that he was not interviewed by the defense, nor was any attempt made to do so despite the fact that he was available at all times. The slightest inquiry of James at once would have revealed that his brother John also was a witness to the events and that their versions were in accord. And entirely apart from the foregoing, there is the additional fact that upon the trial, in response to a subpoena, the defense counsel received New York City Police Department reports, which included one of an interview with John Joyce setting forth his observations.

Thus, it is beyond peradventure that the claim of defense counsel that he "never knew of this witness [John T. Joyce]" until after trial is specious and the charges predicated thereon are utterly without substance. In sum, there was no deception resulting from the inadvertent non-

disclosure of John Joyce's name, particularly since his existence was known to defense in ample time prior to trial to interview him had defendant been so minded. We have not yet reached the point, at least in this court's view, where the prosecution, having specifically and in ample time before trial, directed the attention of the defense to witnesses who may be potentially useful to it or where the defense itself, in ample time before trial, knows of such witnesses, is additionally required to associate itself with the defense, assist defense counsel in preparing for trial and to disgorge its files not otherwise available to the defense under the Rules of Criminal Procedure.[1]

Finally, considering the motion in its aspect for a new trial, this too must fall. The proposed evidence of John, even assuming it were newly discovered, which it is not, measured by either the Berry or Larrison[2] test, affords no basis for granting a new trial.

The motion is denied in all respects.

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[1] Cf. *United States* v. *Gleason*, 265 F. Supp. 880, 884 (S.D.N.Y. 1967).

[2] See *United States* v. *Costello*, 255 F.2d 876, 879 (2d Cir.), cert. denied, 37 U.S. 937 (1958); *United States* v. *Fassoulis*, 203 F. Supp. 114 (S.D.N.Y. 1962).

APPENDIX "B"

TITLE 18, U.S. CODE, SECTION 659

Whoever embezzles, steals, or unlawfully takes, carries away, or conceals, or by fraud or deception obtains from any railroad car, wagon, motor truck or other vehicle . . . with intent to convert to his own use any goods or chattels moving as or which are a part of or which constitute an interstate or foreign shipment of freght or express; • • • shall in each case be fined not more than $5,000 or imprisoned not more than ten years, or both . . .

TITLE 28, U.S. CODE, SECTION 2255

A prisoner in custody under sentence of a court established by act of Congress claiming the right to be released upon the ground that the sentence was imposed in violation of the Constitution or laws of the United States . . . may move the court which imposed the sentence to vacate, set aside or correct the sentence.

• • •

An appeal may be taken to the court of appeals from the order entered on the motion as from a final judgment on application for a writ of habeas corpus.

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No. 113

In the Supreme Court of the United States

OCTOBER TERM, 1968

THOMAS KAPATOS, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

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In the Supreme Court of the United States

OCTOBER TERM, 1968

No. 119

THOMAS KAPATOS, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

After a jury trial in the United States District Court for the Southern District of New York, petitioner was found guilty of theft of jewelry from an interstate shipment, in violation of 18 U.S.C. 659. On October 28, 1966, petitioner was sentenced to imprisonment for 7½ years. The court of appeals affirmed, and this Court denied a petition for a writ of certiorari. 389 U.S. 836.

Thereafter, petitioner filed a combined motion for a new trial on the ground of newly discovered evidence and for vacation of sentence pursuant to 28 U.S.C. 2255, supported by affidavits (R. 707–718). After oral argument, the district court denied the

810-871—68

motion in all respects (R. 767–772; Pet. App. 1–3). On April 23, 1968, the court of appeals affirmed without opinion (R. 827).

The evidence at the original trial resulting in petitioner's conviction is set forth at pp. 2–4 of the government's memorandum in opposition in *Kapatos* v. *United States*, No. 166, O.T. 1967, certiorari denied, 389 U.S. 836. That evidence, insofar as it is here pertinent, showed that an automobile containing two men dressed as policemen overtook the station wagon of the AAA Jewelry Messenger Service. The messengers were ordered out of the station wagon and into a panel truck by the "policeman" who had been a passenger in the automobile and who had directed the station wagon to stop. Four messengers identified petitioner as that "policeman." They did not see petitioner or the station wagon depart. One Mullett testified that he was in an automobile near the place of the robbery and that a "policeman"—one who had red hair and was not petitioner—asked for help in operating a stick shift. The "policeman" led Mullett to the AAA station wagon. When the "policeman" still could not operate the car, he departed on foot. Three defense witnesses also testified to the same effect.

In support of the instant motion, petitioner offered the affidavit of John T. Joyce. It alleged that, while working on a demolition project on the day of the robbery, he saw the black sedan and the station wagon. The "cop" with red hair who tried to drive off with the station wagon was the same "cop" who had earlier emerged from the sedan, approached the station wagon

and ordered the messengers out. Joyce alleged further that he had given a statement "regarding this" to the F.B.I. about November 12, 1963 (R. 718–719).

Mr. Lopez, petitioner's counsel, alleged in his affidavit that he did not know that John T. Joyce was a potential witness and "never spoke to him until after the judgment of conviction" (R. 712–713). The government, before trial, had given Mr. Lopez the names of eight persons whom the government did not intend to call as witnesses, but who might "have information which you may determine to be pertinent to your client's defense" (R. 729, 739). This list did not include the name John T. Joyce, but did include his brother, James P. Joyce (R. 714–715).

The government's answering affidavit alleged that the attorney had sent the letter naming the eight witnesses after reviewing F.B.I. reports of interviews of over 150 persons. It represented an effort to apprise defense counsel of all eyewitnesses known to the government (other than the messengers). The failure to include John T. Joyce's name was inadvertent (R. 728–730).[1] The affidavit stated that, after Mr. Lopez had been retained as petitioner's counsel, some three or four months prior to trial, he discussed with government counsel a Life Magazine article regarding the hijacking. The article showed that the Joyce brothers were eyewitnesses on a hill "four-and-a-half stories above the lot, with a clear view of 41st Street," and had subsequently looted the abandoned station wagon (R.

[1] The reports as to statements by James and John Joyce were identical in appearance and contained the same information.

735–736, 740).* A supplementary affidavit by government counsel alleged that, pursuant to subpoena, Mr. Lopez received during the trial New York City Police Department reports relating to its investigation, which included a report of the Department's interview of John T. Joyce showing that he had witnessed the hijacking (R. 742–744).

At the hearing on the motion, Mr. Lopez acknowledged that, prior to trial, he had read the Life article mentioning John T. Joyce (R. 792). He also stated that he had seen John T. Joyce's name on the New York Police Department record turned over to him during the trial (R. 793). Mr. Lopez also acknowledged that, although he had obtained from the government's letter the name and address of James P. Joyce, he did not interview him (R. 790).

The district court properly overruled the motion for a new trial and to vacate sentence. There was no suppression of evidence as in the cases relied upon by petitioner. The government gave counsel the name of James P. Joyce whose recollection was the same as John's (see R. 728, 789, 803). Moreover petitioner knew before trial that there were in fact two Joyce brothers who witnessed the incident.

Petitioner argues that there was no reason for him to interview Joyce who, although he could observe the movement of all involved, could not see the faces (Pet. 13). He claims that Joyce's statement to the New York police did not indicate that the policeman-

* Both Joyce brothers were convicted of receiving stolen property (Pet. App. 2).

bandit who originally alighted from the truck and the policeman-bandit who tried to start the station wagon were the same man, and that not until the government invented the theory of a "switch" by the two policemen was there any reason to believe that the Joyce testimony would be relevant (Pet. 12–13). The statement to the New York police, however, in referring to "one male dressed in blue uniform with gun in hand" and later to "a man dressed in what appeared to be a police uniform" (R. 744), did not exclude the possibility that these referred to the same "policeman." Moreover, the Life article itself reported the participation of two men dressed as policemen. The government attorney said in his opening statement that the evidence would show that petitioner was the policeman who ordered the station wagon to stop, but that it was the other policeman who was unsuccessful in attempting to drive away the station wagon (R. 13).

Petitioner did not thereafter claim surprise or move for a continuance. There was explicit testimony at the trial by the messenger, Kriesman, that two of the bandits were dressed as policemen (R. 32). The tenor of the testimony of defense witnesses was that only one policeman was involved and that he was not the petitioner. Thus, as the trial judge found, not only was there no deliberate suppression by the government, but there is no reason to believe that the newly proffered testimony would have affected the verdict.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

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No. 119

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OCTOBER TERM 1968

THOMAS KAPATOS,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit.

REPLY OF PETITIONER TO GOVERNMENT'S MEMORANDUM

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REPLY OF PETITIONER TO GOVERNMENT'S MEMORANDUM

The government is content that the law as set out in petitioner's brief is controlling, as the government neither distinguishes any cases nor cites any itself.

The government is content to suggest that the cases are not applicable because there was no suppression of evidence favorable to the defense.

Yet, it admits—as it must—that the government did not supply the name of John T. Joyce who did possess evidence favorable to the petitioner and contrary to the government's theory of the case.

The government states (G. Br. 4) that the attorney for petitioner, Mr. Lopez, acknowledged that he had seen John T. Joyce's name on the New York Police Department record turned over to him during trial. We set out at p. 12 of our Petition, Joyce's statement to the New York police which was given to counsel before trial, and we pointed out that there was lacking in that statement the crucial information which was contained in Joyce's later statement to the F.B.I., *which statement was not given to defense counsel.* The F.B.I. statements made by Joyce contained the crucial information, not divulged to defense counsel that the policeman-bandit who originally alighted from the truck, and the policeman-bandit who tried to start the station wagon were one and the same man. That important piece of evidence, which may have persuaded the jury to vote otherwise than guilty, was withheld from defense counsel—inadvertently, according to the government, but withheld to the prejudice of the petitioner nonetheless.

It is the government's theory that petitioner is to be punished because his lawyer failed to follow up false leads and should have been more imaginative in guessing the government's theory of the case beforehand.

The fact remains—and it is not contravened by the government—that the evidence which could have been given by John T. Joyce was material and relevant to the de-

fense in proving that petitioner could not have been one of the holdup men and that the F.B.I. had statements from John T. Joyce favorable to the petitioner. Although given a list of other names of possible witnesses, the government "inadvertently" failed to supply the name of John T. Joyce and defense counsel's failure to smell him out from a reading of the Life Magazine article is now claimed by the government to excuse the prosecution's dereliction of its duty to see that defendant receives a fair trial.

Such concept is not in accord with the cases cited in the petition or in accord with the concepts in the following articles: Brennan, *The Criminal Prosecution: Sporting Event or Quest for Truth,* 1963 Wash. U.L.Q. 279; *The Duty of the Prosecutor to Disclose Exculpatory Evidence,* see note, 60 Colum. L.Rev. 858 (1960); *Prosecutor Held to Have Duty to Disclose Material Exculpatory Evidence Without Prior Defense Request,* see Comment, 39 N.Y.U.L.Rev. 565 (1964).

We respectfully submit that even if the failure to submit the name of John T. Joyce was not deliberate, the withholding of Joyce's F.B.I. statement which contained evidence disproving the government's theory should authorize a new trial.

Respectfully submitted,

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